Supreme Court, U. S.
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80-410

No. .....

Supreme Court of the United States

October Term, 1980

IN RE: REGINALD WASHINGTON,
Bankrupt,

MYRON E. WASSERMAN, Trustee
Petitioner,

vs.

DIANE MARGARET WASHINGTON a/k/a
JOANN WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

On *September 2, 1976* a wife filed a divorce complaint asking for her husband's interest in an automobile and certain real estate. However, by the time the divorce complaint was filed the real estate had already been sold, and the husband only held the proceeds in the form of a bank draft. On *October 8, 1976* the husband filed a petition in bankruptcy listing the automobile and bank draft. On *January 24, 1977* the Bankruptcy Court declared the bank draft and the automobile part of the bankrupt's estate. The bankrupt then turned the bank draft over to the Trustee in bankruptcy. On *February 2, 1977* a domestic relations court awarded the bankrupt's interest in the real estate proceeds and the automobile to the wife. The Question Presented is:

I. Does the mere filing of a state divorce complaint before the filing of a bankruptcy petition oust a federal bankruptcy court from any jurisdiction over the disposition of the marital property despite the fact that it is the function of the Bankruptcy Court to gather and liquidate the bankrupt's estate?

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JOANN WASHINGTON,
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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

The petitioner, Myron E. Wasserman, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, rendered in these proceedings on July 8, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, is set forth in the Appendix, *infra,* pp. A1-A8. The opinion of the District Court for the Northern District of Ohio is unreported, and appears in the Appendix, *infra,* pp. A9-A11. The opinion of the Bankruptcy Court for the Northern District of Ohio is also unreported, and is set forth in the Appendix, *infra,* pp. A13-A21.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was rendered on July 8, 1980. *See* Appendix, p. A1, *infra*. This petition for certiorari was filed less than 90 days from the judgment date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

Chapter 11 U.S.C. §35(a) provides in pertinent part as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife or child . . . .

Chapter 11 U.S.C. §110(c) provides in pertinent part as follows:

> The trustee shall have as of the date of bankruptcy the rights and powers of: . . . (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists.

Chapter 11 U.S.C. §523(a) provides in pertinent part as follows:

> A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt— . . . (5) to a spouse, former spouse, or child

of the debtor, for alimony to, maintenance for, or support of both spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support; . . . .

STATEMENT OF FACTS

On October 8, 1976, the bankrupt filed his petition in bankruptcy in the United States District Court under Case No. B76-1751. In his schedules filed therein, in Schedule B-2, under "Cash on Hand," the bankrupt listed the sum of Five Thousand Nine Hundred Seventy-Seven and 07/100 Dollars ($5,977.07). Under "Automobiles," the bankrupt listed a 1972 Hornet. Examination at the First Meeting of Creditors by the Trustee (Petitioner) disclosed that this sum was a bank draft issued by the Shaker Savings Association payable to the bankrupt and his spouse, representing proceeds from the sale of real estate formerly owned by the bankrupt and located at 20715 Amherst Road, Warrensville Heights, Ohio.

On November 17, 1976, the Trustee through counsel filed a Complaint to Recover Funds against the bankrupt and joined as a defendant the spouse, JoAnn D. Washington (Respondent). In the Complaint, the Trustee alleged that the bankrupt had in his possession or under his control at the time of his adjudication the sum of Five Thousand Nine Hundred Seventy-Seven and 07/100 Dollars ($5,977.07), representing the net proceeds due him

in connection with the sale of certain real estate known as 20715 Amherst Road, Warrensville Heights, Ohio; and, that these funds were an asset of the bankrupt's estate and should be paid to the Trustee. The Trustee further alleged that the spouse had or claimed to have an interest in the funds adverse to that of the Trustee and so should be required to set forth whatever interest she might have in those funds or have her interest extinguished.

Also on November 17, 1976, the Trustee filed a Complaint to sell a certain 1972 Hornet automobile; in the Complaint, the spouse was listed as a defendant and was duly served with summons on November 22, 1976.

On or about December 9, 1976, the respondent, through counsel, filed a Motion to Dismiss the Complaints as to herself for the reason that the Court lacked jurisdiction over the subject matter.

At the hearing held before the Bankruptcy Court on January 6, 1977, the following facts were established:

(1) As of August 3, 1976, Reginald Washington and the respondent were the owners of real estate described as 20715 Amherst Road, Warrensville Heights, Ohio.

(2) The sale of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio, was consummated on or before August 27, 1976.

(3) On August 30, 1976, Shaker Savings Association from its escrow account issued a draft in the amount of Five Thousand Nine Hundred Seventy-Seven and 07/100 Dollars ($5,977.07), payable to the bankrupt and his spouse, the respondent.

(4) On September 2, 1976, Diane Margaret Washington filed a Complaint for divorce and other equitable relief against Reginald Washington in the Court of Common

Pleas of Cuyahoga County, under Case No. D-75820, wherein she alleged that she and Mr. Washington were the joint owners of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio, when in fact the premises had been sold on or about August 27, 1976. Mrs. Washington further alleged that she and the bankrupt had acquired two automobiles.

(5) The Petition in Bankruptcy of Reginald Washington was filed on October 8, 1976.

(6) The Certificate of Title to the 1972 Hornet automobile was issued in the name of the bankrupt prior to the institution of the divorce action and had been since November 17, 1975; and, on October 8, 1976, Reginald Washington was the only titled owner of the 1972 Hornet automobile.

On January 24, 1977, the Motion to Dismiss was denied by the Honorable John F. Ray, Jr., Bankruptcy Judge, on the following two grounds:

(1) That the Court of Common Pleas did not acquire jurisdiction over the net proceeds from the said premises in that the proceeds were not specific property upon which Lis Pendens could operate, nor did the Court of Common Pleas acquire jurisdiction over the premises, since that had been sold prior to the filing of the Complaint.

(2) That the doctrine of Lis Pendens did not apply to the automobile in question, since the Bankruptcy Court doubted that the doctrine in Ohio applies to automobiles; but even arguendo it does, the automobile was not sufficiently described in the Complaint.

Shortly after the opinion by the Bankruptcy Court the bank draft was delivered to the Trustee.

On or about February 22, 1977, the respondent was awarded the bankrupt's interest in the proceeds from the

sale of the real estate and the 1972 Hornet automobile by the Court of Common Pleas, Domestic Relation Division, the Honorable Patrick F. Gallagher, presiding.

On February 2, 1977, respondent filed a Notice of Appeal to the District Court from the decision of the Bankruptcy Court.

While this appeal was pending, the Trustee and respondent jointly negotiated the bank draft from the sale of the real estate. The Trustee kept one half of this sum representing the bankrupt's interest in the real estate plus seven hundred fifty dollars ($750.00) which was the agreed upon value for the 1972 Hornet automobile.

On January 12, 1978, the United States District Court, Northern District of Ohio, Eastern Division, the Honorable Robert F. Krupansky, presiding, affirmed the judgment of the Bankruptcy Court on the following two grounds:

(1) That the doctrine of Lis Pendens had no application to the proceeds from the sale of the real estate, since the proceeds did not constitute a *res*.

(2) That the doctrine of Lis Pendens did not apply to the automobile in question, since the Court doubted that the doctrine applies to automobiles; but even arguendo it does, the automobile was not sufficiently described in the Complaint.

On February 2, 1978, the appellant filed a Notice of Appeal in the United States District Court. On March 6, 1978, the United States Court of Appeals for the Sixth Circuit docketed the captioned case *in forma pauperis*.

On July 8, 1980 the United States Court of Appeals for the Sixth Circuit reversed the judgments of the Bankruptcy Court and District Court. The Court of Appeals held that the Bankruptcy Court's jurisdiction over the

bankrupt's property should yield to the Domestic Relations Court. This result was based on the assumption that since both courts had concurrent jurisdiction the Bankruptcy Court should yield jurisdiction based upon traditional notions of comity.

The case is now before this court on petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit's decision directly conflicts with this Court's decisions concerning conflict of jurisdiction between federal and state courts.

In *Harkin v. Brundage,* 276 U.S. 36 (1928) this Court stated that:

> "The principle which should govern in a conflict of jurisdiction . . . has been a number of times stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute; *but where the jurisdiction is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill; it is the date of the actual possession of the receiver that determines the priority of jurisdiction.*" *Id.* at 43 (emphasis added).

Furthermore, in *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189 (1935) this Court reaffirmed this position and stated:

> "If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property pendente lite, the time of acquiring actual possession may perhaps be the decisive factor." *Id.* at 196.

In the present case the Sixth Circuit erroneously assumed that the jurisdictions of the Federal Bankruptcy Court and the Ohio Domestic Relations Court were concurrent. The Domestic Relations court only had jurisdiction to dissolve the marriage before it, and to divide the marital property. The Bankruptcy Court, on the other hand, had exclusive jurisdiction to gather and liquidate the assets of the bankrupt's estate. Since the Bankruptcy Court first acquired actual possession of the bank draft and first asserted its jurisdiction over the automobile, the Bankruptcy Court had prior jurisdiction over the debtor's property in dispute.

2. The resolution of the conflicting jurisdictions of Domestic Relations Courts and Bankruptcy Courts is an important federal question that should be decided by this Court.

Divorce and Bankruptcy frequently occur together. The financial strain before bankruptcy many times precipitates a divorce, and the strain of divorce many times precipitates a bankruptcy. Congress recognized many of these related problems in both the 1898 Bankruptcy Act

and the 1978 Bankruptcy Code.[1] The federal Bankruptcy Court must have superior jurisdiction so that the delicate balance between divorce and bankruptcy created by Congress can be effectively executed.

3. Since the Bankruptcy Act gives petitioner the rights of a creditor who has obtained a lien on the bankrupt's property, the Sixth Circuit made an obvious error of state law when it implied that Lis Pendens attached to the automobile and bank draft.

The Sixth Circuit erroneously assumed that the Ohio doctrine of Lis Pendens was not applicable to the present case. Section 70(c) of the Bankruptcy Act of 1898 states that:

> "The trustee shall have as of the date of bankruptcy the rights and powers of: . . . (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists." 11 U.S.C. §110(c).

This section of the act puts the trustee in the position of a lien creditor on the bankruptcy filing date. Since bankruptcy was filed before the judgment of the Domestic Relations Court one must look to the Ohio doctrine of Lis Pendens to determine if the trustee took the property subject to the pending divorce action.

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1. An example of Congressional concern for divorce problems in bankruptcy is the special privilege given to debts arising out of alimony or support obligations. *See* §17(a)(7) of the 1898 Bankruptcy Act (11 U.S.C. §35(a)(7)) and §523(a) of the 1978 Bankruptcy Code (11 U.S.C. §523(a)).

The appellate court misapplied the Ohio doctrine of Lis Pendens. Under Ohio law there are four elements for the application of Lis Pendens: (1) the property must be of a character subject to the rule; (2) the court of the pending suit must have jurisdiction both of the person and the property; (3) the property involved must be sufficiently described in the pleadings; and (4) the litigation must be about specific property that is necessarily affected by the termination of the suit. *Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co.*, 61 Ohio L. Abs. 470 (C.P. 1951). Despite the fact that Ohio law commonly states that Divorce actions are In Rem proceedings, the elements of Lis Pendens must still be met for a lien to be subject to a pending divorce action. *Domino v. Domino,* 45 Ohio Op. 151, 60 Ohio L. Abs. 484, 99 N.E.2d 825 (C.P. 1951); *Bowles v. Middletown Collateral Loan Co.*, 71 Ohio Op. 2d 110, 328 N.E.2d 821 (Ct. App. 1974).

Respondent's original divorce complaint could not attach Lis Pendens to the bank draft. Ohio law clearly states that Lis Pendens does not apply to a negotiable bank draft. *Stone v. Elliott,* 11 Ohio St. 252 (1860); *Muskingum County Com'rs v. State,* 78 Ohio St. 287 (1908); *Sweigart v. Piqua Milling Co.*, 40 Ohio L. Abs. 398 (Ct. App. 1944). When respondent's divorce action was filed in the present case, the real property alluded to in the complaint had already been sold and the proceeds were represented by a negotiable check. Therefore, Ohio Lis Pendens law would not prevent the trustee from obtaining priority to the bankrupt's interest in the check.

Neither the bank draft nor the automobile met the Lis Pendens requirement that they be specifically described in the complaint. Ohio law requires property to be specifically described in a divorce complaint if Lis Pendens is to attach. *Domino v. Domino,* 45 Ohio Op. 151,

60 Ohio L. Abs. 484, 99 N.E.2d 825 (C.P. 1951). In the present case, neither piece of property was sufficiently described. The car was merely described as a "1972 Hornet Automobile," and the bank draft was never mentioned at all. Thus, subsequent lien holders were not put on notice of the pending divorce suit.

Even if the description of the automobile was sufficient, it did not appear in the proper place under Ohio law. In Ohio the prayer for relief cannot be considered part of the complaint. *Manney v. Manney,* 42 Ohio L. Abs. 153, 59 N.E.2d 755 (Ct. App. 1944). Respondent's divorce complaint only mentioned the 1972 Hornet automobile in the prayer for relief. Since the property was not described at all in the complaint itself, Lis Pendens could not have attached.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCPIT

(Decided and Filed July 8, 1980)

No. 78-3113

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: REGINALD WASHINGTON,
Bankrupt,

MYRON E. WASSERMAN, TRUSTEE,
Plaintiff-Appellee,

v.

DIANE MARGARET WASHINGTON a/k/a
JOANN WASHINGTON,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Ohio

Before: EDWARDS, *Chief Judge,* and PHILLIPS and PECK, *Senior Circuit Judges.*

PECK, *Senior Circuit Judge.* The issue presented in this appeal is whether jurisdiction over certain property lies in an Ohio domestic relations court or a federal bankruptcy court. The district court affirmed the bankruptcy court's decision holding that the state court had not assumed jurisdiction over the property involved in this litigation. We reverse.

In August, 1976, Mr. and Mrs. Washington sold their jointly owned home and received a check in both of their names for $5,977.07, evidencing their equity in the premises. Attached to the bank draft was a statement noting that the instrument represented proceeds from the sale of property located at 20715 Amherst Road, Warrensville Heights, Ohio.

Mrs. Washington filed suit for divorce in an Ohio court five days after the house was sold. In her state court complaint, Mrs. Washington alleged that she and Mr. Washington were joint owners of the Amherst property and, in her prayer for relief, she asked to be granted the "entire equity" in said property as alimony. She further alleged that she and her husband had acquired "two automobiles," and demanded that she be granted "the 1972 Hornet Automobile" in her prayer. Mr. Washington was served with the complaint on September 4, 1976.

On October 8, 1976, a little more than a month after the commencement of the divorce proceedings, Mr. Washington filed a petition in bankruptcy, listing the proceeds from the sale of the Amherst property and the 1972 Hornet automobile as assets. The bankruptcy trustee became aware that the check, which had been placed in the hands of Mr. Washington's attorney, represented proceeds from the sale of the Amherst property at the first meeting of creditors.

The following month, the trustee in bankruptcy filed a complaint to recover funds from Mr. Washington in which Mrs. Washington was named as a defendant because of her ostensible interest in the bank draft. Mrs. Washington moved to dismiss the complaint for lack of jurisdiction over the '72 Hornet and the funds represented by the bank draft. She contended that the Ohio divorce

court had exclusive jurisdiction over this property since the divorce complaint had been filed prior to the bankruptcy petition and the property had been specifically identified in her state court pleadings.

The bankruptcy judge overruled Mrs. Washington's motion, holding that the Ohio court had not acquired jurisdiction over the property in question. A short time later, the Ohio domestic relations court awarded Mrs. Washington her husband's "interest" in both the proceeds of the sale of the Amherst property and the Hornet automobile. Mrs. Washington then appealed the bankruptcy judge's decision to the district court relying as before upon Ohio's *lis pendens statute*.[1] The district court affirmed on the grounds that (1) the doctrine of *lis pendens* had no application to the proceeds of the sale of the real estate because the complaint described property that had been sold prior to the commencement of the divorce proceedings, and (2) *lis pendens* did not apply to the '72 Hornet since the court doubted that the doctrine applied to automobiles in Ohio. The court further held that the automobile in question was not sufficiently described in the divorce complaint. This appeal followed.

It is a well settled rule that where property is claimed by a bankruptcy trustee after the commencement of an in rem action in state court, the state court retains jurisdiction of the property for completion of the proceedings relating to it. *Straton v. New*, 283 U.S. 318 (1931); *Eyster v. Gaff*, 91 U.S. 521 (1876); *Carney v. Sanders*, 381 F.2d 300 (5th Cir. 1967). While subject to some important ex-

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1. "When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against plaintiff's title." Ohio Rev. Code Ann. § 2703.26 (Page).

ceptions not relevant here,[2] this rule is merely a specific application of the general rule that where two in rem or quasi in rem actions are brought, one in state court, the other in federal court, the first court to assume jurisdiction over the property which is the subject of the two suits may maintain and exercise jurisdiction to the exclusion of the other. *Donovan v. Dallas,* 377 U.S. 408, *rehearing denied,* 379 U.S. 871 (1964); *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456 (1939); *Farmers' Loan and Trust Co. v. Lake Street Elevated R. Co.,* 177 U.S. 51 (1900). The Supreme Court has deemed this rule "essential to the orderly administration of justice, and to prevent unseemly conflicts between courts. . . ." *Farmer's Loan, supra* at 61.

The controversy in the present case has focused upon the application of Ohio's *lis pendens* statute. Deeply rooted in the common law doctrine of *lis pendens,* the Ohio statute operates to protect litigants from the *pendente lite* transfer to third persons of property that is the subject of litigation. Historically, this protection has been conditioned upon some form of notice sufficient to safeguard the interests of prospective purchasers. While some states require, by statute, formal notice to be filed in the public records, Ohio continues to follow the traditional rule that requires only that a description of the property appear in the pleadings. *Cook v. Mozer,* 108 Ohio St. 30, 140 N.E.

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2. The bankruptcy court's jurisdiction is exclusive with respect to assets of the bankrupt sequestered in state court proceedings within four months of the filing of bankruptcy where the state court proceeding involves an action for a lien, an assignment for creditors, a receivership, or state insolvency proceedings. *See, e.g., Straton v. New,* 283 U.S. 318 (1931); 5 Remington on Bankruptcy §§ 2047 and 2048 (5th Ed. 1953). Although the bankruptcy proceeding in the instant case was instituted within one month from the filing of the divorce complaint, neither the district court nor the parties have suggested that this circumstance gives rise to exclusive jurisdiction over the property in the bankruptcy court.

590 (1923); *Parker v. Parker,* 28 Ohio L. Abs. 49, 56 N.E.2d 527 (Ct. App. 1938).

The district court assumed that *lis pendens'* principles control the resolution of this case. It expressed its belief that the doctrine is inapplicable to personal property in Ohio, and stated further that the property was not sufficiently described in the divorce complaint, even if the doctrine is applicable to personalty. Apparently, in so ruling, the district court relied, as does the appellee, on the oftstated rule that the prayer for relief constitutes no part of the pleading. *See, e.g., Manney v. Manney,* 42 Ohio L. Abs. 153, 59 N.E.2d 755, 758 (Ct. App. 1944).

We note first that Ohio's *lis pendens* statute does apply to personal property. *See Sweigart v. Piqua Milling Co.,* 40 Ohio L. Abs. 398, 57 N.E.2d 327 (Ct. App. 1943). We need not decide, however, whether the rule that averments contained in the prayer be disregarded when determining whether a cause of action has been stated, *Tiffin Glass Co. v. Stoehr,* 54 Ohio St. 157, 163, 43 N.E. 279 (1896), likewise applies to a determination of whether there is a valid *lis pendens, but see* Rule 8(a), Ohio R. Civ. P. ("A pleading . . . shall contain . . . (3) a demand for judgment. . . ."); *Culver v. Rodgers,* 33 Ohio St. 537, 546 (1878) ("[T]he demand for relief forms part of the petition, yet it constitutes no part of the statement of facts constituting the cause of action."); *accord, Porter v. Norris,* 30 Ohio St. 2d 255, 285 N.E.2d 14 (1972) (Corrigan, J., dissenting); and 6 MOORE'S FEDERAL PRACTICE ¶54.62, at 1262 (2d ed. 1976) ("[T]he prayer for relief is an essential part of a pleading . . . , [though] it constitutes no part of the pleader's cause of action."); *Parker v. Parker,* 28 Ohio L. Abs. 49, 56 N.E.2d 527, 532 (Ct. App. 1938) (property description contained in prayer for relief satisfies requirement that description appear in pleadings for in rem jurisdiction), for we do not

believe the resolution of this case turns upon Ohio's application of its *lis pendens* statute.

The cases do not suggest that the conflict between the jurisdiction of a federal bankruptcy court and a state court is to be resolved by looking to the state law of *lis pendens*. *See, e.g., Straton v. New,* 283 U.S. 318 (1931); and *Eyster v. Gaff,* 91 U.S. 521 (1875). The reason is that in cases such as this, the rights in property between a litigant and a stranger to the litigation, both of whom claim an interest in the subject matter of the litigation, are not the crux of the matter. Rather, the focus is upon traditional notions of comity, which require that, as between state and federal courts, jurisdiction must be yielded to the court that first acquires jurisdiction over the property. In *Princess Lida, supra,* 305 U.S. at 466, the Court stated that this principle applies not only where property is judicially seized but in all cases where, "to give effect to its jurisdiction, the court must control the property." Thus, the only question before us is whether the Ohio domestic relations court assumed in rem jurisdiction over the '72 Hornet automobile and the proceeds from the sale of the Amherst property, in some manner, prior to the institution of bankruptcy proceedings. We hold that it did.

In Ohio, "[a]n action for alimony where the relief sought is the appropriation of property situated in the county where the action is brought is substantially one in rem." *Benner v. Benner,* 63 Ohio St. 220, 58 N.E. 569 (1900). It is clear that a specific description of property contained in the pleadings is sufficient to bring it within the in rem jurisdiction of Ohio courts in an action for alimony. *Reed v. Reed,* 121 Ohio St. 188, 167 N.E. 684 (1929). There is court of appeals authority in Ohio, however, to the effect that this is not a necessary condition. In *Dexter v. Taylor,* 47 Ohio Ops. 398, 107 N.E.2d 402 (Ct. App.), *appeal dismissed,* 156 Ohio St. 182, 101 N.E.2d 502 (1951), it

was held that property of a spouse within the territorial jurisdiction of a court is subject to that court's in rem jurisdiction, even though the property is not described in the pleadings. This holding is in harmony with decisions of a number of other states, which reason that, where a state statute authorizes the courts to award alimony out of the property of a defendant's spouse, a defendant who receives notice of an action for divorce and alimony is thereby put on notice that his property located within the state has been brought within the court's jurisdiction and may be appropriated for the payment of alimony. *See, e.g., McElroy v. McElroy,* 32 Cal. App.2d 828, 198 P.2d 683 (1948); *Walker v. Manson,* 49 Idaho 468, 289 Pac. 86 (1930); *Closson v. Closson,* 30 Wyo. 1, 215 Pac. 485 (1923); *see generally* 10 A.L.R. 3d 212, § 11 (1966). *Parker v. Parker,* 28 Ohio L. Abs. 49, 56 N.E.2d 527 (Ct. App. 1938) is to the contrary, but we believe *Dexter, supra,* is the better reasoned case. Moreover, even were we to view the *Parker* decision as representing the law in Ohio, it would be of little assistance to appellee, for the *Parker* court declared that a description of property found in the "prayer for relief" satisfies the requirement that the subject matter of the litigation be described in the pleadings. *Id.* at 532.

Applying the rule found in *Dexter v. Taylor, supra,* the Ohio court acquired jurisdiction over the property at issue here upon service of process on Mr. Washington, without regard to any description thereof in the pleadings. Moreover, jurisdiction was also acquired under the *Parker* test. The automobile was specifically described as "the 1972 Hornet Automobile" in the prayer for relief. The prayer also asked for the "equity" in the Amherst real estate, which, when the divorce complaint was filed, consisted of the proceeds from its sale. The proceeds were evidenced by a bank draft, a negotiable instrument to which

in rem jurisdiction may attach. In light of the fact that the bank draft contained a statement on its face that it represented the "net proceeds" or equity from the sale of the Amherst property, and this equity was mentioned in the prayer, we believe there was sufficient notice that this property was the subject of the state court litigation to satisfy the *Parker* test for the exercise of in rem jurisdiction.

We are convinced that the Ohio domestic relations court assumed jurisdiction over the property here in question prior to the commencement of bankruptcy proceedings upon any view of Ohio law. We hold, therefore, that jurisdiction properly lies in the Ohio court, and we reverse the district court.

MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT

(Filed January 4, 1978)

Case No. B76-1751

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: REGINALD WASHINGTON, BANKRUPT
MYRON E. WASSERMAN, TRUSTEE,
Plaintiff-Appellee

v.

REGINALD WASHINGTON, et al.,
Defendants-Appellant

MEMORANDUM AND OPINION

KRUPANSKY, *J.*

Appellant, Diane Margaret Washington, appeals to this Court from a decision of the bankruptcy court for this district and division. Therein, the bankruptcy judge John F. Ray, Jr. overruled the motion of appellant to dismiss the complaint for lack of jurisdiction and ordered the bankrupt Reginald Washington to pay over the Trustee the sum of $2,988.54 from the net proceeds of sale of the premises located at 20715 Amherst Road, Warrensville Heights, Ohio. Judge Ray additionally found that the title to a 1972 Hornet automobile vested by operation of law in the Trustee.

The facts and circumstances giving rise to this cause of action are not in dispute. On or before August 27, 1976,

Mr. and Mrs. Washington consummated the sale of their premises located at 20715 Amherst Road, Warrensville Heights, Ohio. Subsequent thereto, the net proceeds from said sale, namely, $5,977.07 were disbursed by the escrow agent, Shaker Savings Association, by its check dated August 30, 1976, made payable to Mr. and Mrs. Washington on August 30, 1976 and delivered to the bankrupt on August 30, 1976.

Thereafter, on September 2, 1976, Diane Margaret Washington, appellant herein, instituted an action for divorce and other equitable relief against Reginald Washington, the bankrupt herein, in the Court of Common Pleas of Cuyahoga County.

On October 8, 1976, Reginald Washington filed a petition for voluntary bankruptcy. On November 17, 1976, Myron E. Wasserman, Trustee, filed his complaint to recover funds from the bankrupt and named the appellant a party to the action, asking that she be required to set up her interest in the bankrupts funds.

In objection to the bankruptcy court's jurisdiction, appellant asserts that the institution of the divorce proceeding prior to the filing of voluntary bankruptcy constitutes *lis pendens*.

The doctrine of *lis pendens* has no application unless the court has jurisdiction of both the person and res. *Benton v. Shafer*, 47 OS 117, 24 N.E. 197 (1890); *Eggleston v. Harrison*, 61 OS 397, 59 N.E. 993 (1900); *Cook v. Mozer*, 108 OS 30, 140 N.E. 590 (1923); *Connecticut General Life Ins. Co. v. Binzer Bldg. Co.*, 61 OL Abs 470, 101 N.E. 2d 403 (1950).

Considering the issue relating to the sale of the real estate the uncontroverted facts disclose that said premises were disposed of prior to the institution of the divorce

and bankruptcy proceedings. Judge Ray correctly found that the doctrine of *lis pendens* had no application since there was no *res*, the property having been sold prior to the filing on the divorce proceeding.

For the reasons and citation of authority set forth in Judge Ray's opinion, the Court affirms the bankruptcy court's decision relating to the 1972 Hornet Automobile.

Accordingly, upon review of the record in its entirety, the Judgment of the bankruptcy court is hereby affirmed.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

ORDER OF THE UNITED STATES DISTRICT BANKRUPTCY COURT

(Filed January 24, 1977)

In Bankruptcy

No. B76-1751

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: REGINALD WASHINGTON,
Bankrupt

MYRON E. WASSERMAN, TRUSTEE,
Plaintiff

v.

REGINALD WASHINGTON, et al.,
Defendants

ORDER

This cause came on to be heard upon the complaint of the Trustee to recover funds from the bankrupt, the motion of Diane Margaret Washington to dismiss the complaint for lack of jurisdiction over the subject matter and the evidence.

The Court finds that the motion of Diane Margaret Washington to dismiss the complaint for lack of jurisdiction is not well taken, and same is hereby overruled.

It is, therefore, ORDERED, ADJUDGED and DECREED that Reginald Washington, the bankrupt, pay over to the Trustee the sum of $2,988.54 from the net proceeds of sale of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio.

Dated: January 24, 1977.

/s/ JOHN F. RAY, JR.
Bankruptcy Judge

MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT BANKRUPTCY COURT

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In Bankruptcy No. B76-1751

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
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In re: REGINALD WASHINGTON,
Bankrupt

MYRON E. WASSERMAN, TRUSTEE,
Plaintiff

v.

REGINALD WASHINGTON, et al.,
Defendants

MEMORANDUM OF OPINION AND ORDER

Statement of Fact

This matter is before the Court on the complaint of Myron E. Wasserman, Trustee, to recover funds from the bankrupt, Reginald Washington, and motion of Diane Margaret Washington to dismiss the complaint for lack of jurisdiction over the subject matter.

At the hearing, testimony was presented, exhibits were received and an oral argument was presented. From the evidence, the Court, being fully advised in the premises, finds as follows:

1. As of August 3, 1976, bankrupt, Reginald Washington, and his wife, Diane Margaret Washington, were

owners of real estate described as 20715 Amherst Road, Warrensville Heights, Ohio.

2. The sale of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio, was consummated on or before August 27, 1976.

3. The net proceeds from the sale of the premises in question, namely $5,977.07, were disbursed by the escrow agent, Shaker Savings Association, by its check number E117710, dated August 30, 1976, made payable to Mr. and Mrs. Washington and delivered to Mr. Washington on August 30, 1976.

4. Subsequent to August 30, 1976, Reginald Washington delivered said check to his attorney.

5. On September 2, 1976, Diane Margaret Washington filed a complaint for divorce and other equitable relief against Reginald Washington, in the Court of Common Pleas of Cuyahoga County, under case number D75820, wherein she alleges she and Mr. Washington are joint owners of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio, when in fact the said premises had been sold on or about August 27, 1976. Mrs. Washington further alleged that she and the bankrupt had acquired two automobiles.

6. On October 8, 1976, Reginald Washington filed his petition for voluntary bankruptcy.

7. As of October 8, 1976, Reginald Washington was the titled owner of a 1972 Hornet automobile.

8. On November 17, 1976, Myron E. Wasserman, Trustee, filed his complaint to recover funds from the bankrupt, Reginald Washington, and named Diane Margaret Washington a party to the action, asking that she be required to set up her interest to said funds.

9. On December 9, 1976, Diane Margaret Washington filed a motion to dismiss the complaint of Trustee, for lack of jurisdiction over the subject matter by reason of the doctrine of "lis pendens".

Issue

The question presented is whether or not Diane Margaret Washington, by filing her complaint for divorce and other equitable relief on September 2, 1976, invested the Court of Common Pleas, under the doctrine of lis pendens, with jurisdiction over the net proceeds from the sale of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio, by reason of the fact that she alleged in her complaint for divorce that she and the bankrupt were joint owners of the premises.

Law and Comment

Section 70 (11 U.S.C., Section 110) of the Bankruptcy Act, provides as follows:

> *Title to Property.* a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt

may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further,* That when any bankrupt who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors par-

ticipating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

"All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

"All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his

successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

"The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

In 34 O. Jur.2d, at page 691 wherein *lis pendens* is discussed, it is said:

"§7 *Generally.*—In order that there may be a valid and effective lis pendens, these four elements must be present: (1) The property must be of a character to be subject to the rule; (2) the court must have jurisdiction both of the person and the res; (3) the property or res involved must be sufficiently described in the pleadings; and (4) the litigation must be about some specific thing that must be necessarily affected by the termination of the suit. These requirements are discussed in detail in the following sections, and it must also be noted in this respect that although the mere inception of lis pendens is not affected by laches or lack of diligence in the prosecution of the action or proceeding in which the doctrine of lis pendens is sought to be invoked, the benefits thereof may be lost by such means.

"Under the general lis pendens statute, formal notice is not required to be filed.

"§8. *Specific Property as Subject of Action.*—Under the statute relating thereto, lis pendens operates only upon 'the subject of the action'—that is, the property in controversy. Only actions or suits which have as their object an effect upon specific property put into operation the doctrine of lis pendens. If the relief sought includes the recovery of possession of

property, the enforcement of a lien upon it, the cancellation or creation of a muniment of title, or any other judicial action affecting the title, possession, or right of possession of specific property, then there is, or may be, a lis pendens. An answer by a defendant in a suit to settle partnership affairs, alleging that plaintiff misapplied partnership funds in purchasing certain real estate, which he fraudulently caused to be conveyed to his wife, and praying that the wife and the vendor be made parties and that the property be subjected to the purposes of the partnership, was considered sufficient to affect that property with lis pendens from the time of service of process on the wife, pursuant to the prayer.

"If, on the other hand, no specific property is to be affected by the judgment, there is no lis pendens. Thus, the doctrine is not applicable in an action for a money judgment only, even though that judgment is sought upon a cause of action arising in regard to property specified in the petition, such as where the suit is to recover the value of such property or compensation for injuries thereto.

"§9. *Jurisdiction Over Res and Person.*—There can be no lis pendens unless the court has jurisdiction both of the res and of the person from whom the interest in acquired pendente lite. Furthermore, the pleadings must show on their face jurisdiction over the res by the court in which they are filed.

"Of course, a valid service of summons is essential to confer jurisdiction over the parties and for the commencement of the lis pendens, and therefore, as a rule, a defect in the writ or service makes the doctrine of lis pendens inapplicable.

"§10. *Description of Property in Pleadings.*—It is, of course, necessary to the protection of prospective purchasers from persons involved in litigation that the pleadings in suits in which they are parties specifically describe the property concerned, and lis pendens should not be held operative otherwise. The property should be described so that any who choose to inquire may ascertain precisely what it is. On the other hand, if the petition sufficiently describes the property concerned in the action, or if the property is in some way taken into the possession of the court, the doctrine of lis pendens applies. In such case, the doctrine of lis pendens may, for instance, prevent the assertion of judgment liens obtained after the beginning of the action."

The Court of Common Pleas did not acquire jurisdiction over the net proceeds from the sale of the premises known as 20715 Amherst Road, Warrensville Heights, Ohio, nor did it acquire jurisdiction over the premises, since as of the date of filing the complaint for divorce, namely September 2, 1976, the parties were not the owners of the premises in question.

As said in 34 O. Jur.2d, page 892, paragraph 8, "lis pendens operates only upon 'the subject of the action'—that is, the property in controversy. . ."

If, on the other hand, no specific property is to be affected by the judgment, there is no lis pendens. Thus, the doctrine is not applicable in an action for a money judgment only, even though that judgment is sought upon a cause of action arising in regard to property specified in the petition, such as where the suit is to recover the value of such property or compensation for injuries thereto.

Section 70 (11 U.S.C., Section 110) provides that the trustee of the estate of a bankrupt, upon his appointment

and qualification, shall in turn be vested by operation of law as of the date of filing the petition with title to all the property of the bankrupt enumerated in Section 70a.

In the case at hand, the bankrupt was owner of one-half of the net proceeds from the sale of the premises as of the date of filing his petition in bankruptcy. Therefore, as of said date, the Trustee was entitled to $2,998.54 of the $5,977.07 check issued by Shaker Savings Association for the net proceeds from the sale of the premises in question, and Diane Margaret Washington is entitled to the balance, namely $2,988.53 from said check, which is in the possession of the Trustee, since Mr. and Mrs. Washington were joint record owners of the property prior to sale.

Diane Margaret Washington contends in her motion to dismiss that the doctrine of lis pendens applies to the 1972 Hornet automobile titled in the name of Reginald Washington, bankrupt. This contention is wholly unfounded. Even if the doctrine of lis pendens applied to automobiles, which this Court does not believe, the 1972 Hornet automobile was not sufficiently described in the complaint for divorce, since plaintiff in that action only referred in her complaint to "two automobiles". Therefore, as of October 8, 1976, the date bankrupt filed his petition in bankruptcy, title to the 1972 Hornet automobile was vested by operation of law in the Trustee.

Conclusion

Reginald Washington, bankrupt, is ordered to pay over to the Trustee the sum of $2,988.54 from the net proceeds from the sale of the premises known as 20715 Amherst Road, Warrensville, Heights, Ohio.

Dated: January 24th, 1977.

/s/ JOHN F. RAY, JR.,
Bankruptcy Judge